BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NOS. 2017-305-E AND 2017-370-E

In Re: Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920 In Re: Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Inc., for review and Approval of a proposed business combination between SCANA Corporation and Dominion Energy, Inc., as may be requreired and for a prudency determination regarding the abandonment of the V.C. Summer Units 2 & 3 Project and associated customer benefits and recovery plan.	**SPEAKER OF THE HOUSE JAMES H. "JAY" LUCAS'S RESPONSE IN OPPOSITION TO THE JOINT APPLICANTS' MOTION FOR DECLARATORY RULINGS AND MOTION IN LIMINE**

James H. "Jay" Lucas, in his official capacity as Speaker of the South Carolina House of Representatives (Speaker Lucas), by and through the undersigned attorneys, submits this response in opposition to the motion for declaratory rulings and motion in limine filed by South Carolina Electric & Gas Company (SCE&G) and Dominion Energy, Inc. (Dominion) (collectively "the Joint Applicants"). For the reasons set forth below, the Public Service Commission (the Commission) should deny the Joint Applicants' motion and apply the law.

BACKGROUND

In 2007, the South Carolina General Assembly enacted the Base Load Review Act (the BLRA). 2007 S.C. Act No. 16. The purpose of the BLRA was to incentivize construction of new nuclear power generation plants. See id. Following enactment of the BLRA, in 2008, SCE&G

applied for a base load review order pursuant to sections 58-33-220 and -230 of the South Carolina Code. The Commission approved SCE&G's request for a certificate of public convenience and necessity and issued a base load review order. See PSC Order No. 2009-104. In two opinions, the Supreme Court of South Carolina affirmed almost all aspects of the Commission's order authorizing SCE&G to construct two nuclear power plants pursuant to the terms of the BLRA. See S.C. Users Comm. v. Pub. Serv. Comm'n of S.C., 388 S.C. 486, 697 S.E. 2d 587 (2010); Friends of the Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 692 S.E. 2d 910 (2010).

Shortly after these opinions came down, construction commenced at the V.C. Summer nuclear facility in Jenkinsville, South Carolina (the Project). Unfortunately, the Project immediately ran into cost increases and delays resulting from egregious mismanagement and material misrepresentations by SCE&G. Under the revised rate provisions in the BLRA, SCE&G repeatedly requested and received large rate increases. While receiving these increases, SCE&G intentionally failed to disclose material information to the South Carolina Office of Regulatory Staff (ORS) and the Commission. SCE&G's nondisclosure of relevant materials that revealed the scheduling delays and cost inaccuracies caused the Commission to grant revised rate requests without an accurate picture of the situation unfolding during the various phases of construction.

The Project's cost overruns and scheduling delays became overwhelming to SCE&G. In 2015, SCE&G sought approval to extend the construction schedule and increase project costs by $700 million. See PSC Order No. 2015-661. The Commission granted the request, again without the benefit of the true financial status and scheduling delays of which SCE&G had knowledge. See id. Meanwhile, SCE&G was fully aware that the approved construction schedule was unrealistic and would be impossible to meet.

Perhaps in recognition of the Project's serious woes, SCE&G hired a contractor, the Bechtel Corporation, to undertake an independent review of the Project. Bechtel's initial report

highlighted extreme problems with the construction schedule and management of the construction process by SCE&G. Not surprisingly, SCE&G never disclosed this initial assessment, and SCE&G stonewalled all efforts to obtain the final report. Neither the state's regulators nor the ratepayers were made privy to the contents of this report until the South Carolina Public Service Authority (Santee Cooper) finally turned it over to Governor Henry McMaster in September 2017.[1] This information undoubtedly was essential to the Commission's proper oversight of the Project.

During the period in which SCE&G failed to inform the Commission of these material facts, it continued to petition the Commission for more rate increases and extensions in the construction schedule. To date, as a result of the revised rate increases SCE&G requested through 2016, SCE&G has collected almost $37 million monthly—and nearly $450 million annually—from ratepayers based upon misrepresentations and nondisclosures of important information to the Commission.

After riding this train for years, on August 1, 2017, SCE&G announced its decision to abandon construction of the Project. SCE&G filed a petition with the Commission that same day, seeking a declaration that it was prudent to abandon the Project and requesting to recover all revised rates from its ratepayers. SCE&G later withdrew this petition in response to significant public outrage. SCE&G, of course, refiled the abandonment petition in conjunction with its application for merger with Dominion, and these matters are now pending before the Commission in the Consolidated Dockets.

Recognizing the serious implications of this nuclear debacle, the South Carolina House of Representatives (the House) formed the Utility Ratepayer Protection Committee (the Committee)

[1] Interestingly, now that the document has been made public, SCE&G contends the Bechtel report is meaningless. This after-the-fact assertion is belied by the lengths to which SCE&G went to hide the damning report.

to investigate what went wrong and, as its name suggests, ensure the ratepayers were protected.[2] The Committee, comprised of twenty members, held five hearings during which several of the highest-ranking representatives of SCE&G testified. The Committee also received testimony from representatives of ORS, Santee Cooper, the South Carolina Electric Cooperatives, and members of the public. Following these hearings, as well as extensive study and debate, the House introduced legislation to attempt to fix the problems that arose during SCE&G's debacle.

Specifically, members introduced legislation aimed at achieving a variety of goals: repealing the BLRA, reforming the Commission, modifying ORS's mission, revamping the Public Utility Review Committee, and reinstituting an office to advocate for the consumer. Because SCE&G continued to collect the nuclear premium from its ratepayers, the House also introduced legislation designed to even the playing field so that ratepayers were not forced to foot the entire bill for a hole in the ground from which they will never derive any useful service. Each bill contained pieces or components that were included in the final version of the bill passed by the General Assembly.

During the legislative process, members of the General Assembly engaged in extensive debate over whether (1) legislation could reduce the nuclear premium after abandonment, (2) the terms for prudency review could be amended, and (3) the BLRA could be repealed within the parameters of the Constitution and state law. After much deliberation, the General Assembly passed H.4375 and S.954 (collectively "the Act"). See 2018 S.C. Act No. 287; 2018 S.J. Res. 285. In enacting these laws, the General Assembly properly exercised its constitutional authority to regulate utilities in South Carolina. See S.C. CONST. art. IX, § 1 ("The General Assembly shall

[2] The South Carolina Senate formed a similar committee and held several hearings as well.

provide for appropriate regulation of . . . privately owned utilities serving the public as and to the extent required by the public interest.").

The Act set an experimental rate and directed the Commission to enter an order implementing the rate. Under the Act, the experimental rate remains in effect until the Commission enters an order setting the final rate after a hearing in these Consolidated Dockets. Also, the Act mandated that the Commission monitor the net effect of the experimental rate and, if necessary, adjust it to meet the constitutional requirements of utility ratemaking. The Act repealed the BLRA for any future projects and provided definitions for prudency, imprudency, and fraud. Further, the Commission was instructed to hold a hearing no earlier than November 1, 2018, and to issue a final order by December 21, 2018.

Upon enactment of the Act, the Commission opened a docket and scheduled a special meeting to address the law. SCE&G submitted a letter to the Commission suggesting options for implementation of the law. The Commission then ordered SCE&G to file tariff sheets to support its recommendation for implementing the law. SCE&G complied, and the Commission issued an order adopting all of SCE&G's recommendations and proposals. Notably, SCE&G never argued the Commission should not order the experimental rate, nor did SCE&G move to reconsider or seek appellate review. Instead, SCE&G sued the members of the Commission in federal court. In the federal case, SCE&G challenged the constitutionality of the Act, arguing it constitutes a bill of attainder, violates SCE&G's substantive and procedural due process rights, and amounts to an unconstitutional taking.

SCE&G lost. In an order dated August 6, 2018, the U.S. District Court for the District of South Carolina refused to issue a preliminary injunction and held that SCE&G failed to demonstrate it was likely to succeed on the merits of its constitutional claims. SCE&G then filed an expedited motion for an injunction pending its appeal of the district court's order to the U.S.

Court of Appeals for the Fourth Circuit. In addition to the arguments previously raised, SCE&G sought a specific ruling on its argument that the definition of prudency was retroactive in effect and violated its due process rights. The district court obliged, though not in SCE&G's favor.

On August 7, 2018, in an order denying SCE&G's motion for injunction pending appeal, the district court ruled that SCE&G was not likely to succeed on the merits of its due process claims based upon its retroactivity argument regarding the prudency definitions in the Act. The district court concluded that the definitions of prudency and imprudency did not attach new legal consequences to events completed before its enactment and, therefore, were not retroactive. Further, according to the court, the General Assembly could not have possibly redefined prudency in the Act because that term was never defined in the BLRA. SCE&G subsequently filed the same motion with the Fourth Circuit. The Fourth Circuit summarily denied the emergency motion for injunction pending appeal in an order dated September 24, 2018.

The Joint Applicants now seek to relitigate the same issue here, arguing the Act's definitions of prudency and imprudency are unconstitutional.[3] More specifically, the Joint Applicants contend the Commission should not apply the Act's definitions of prudency and imprudency "retroactively" to the Project because doing so would purportedly run afoul of the Joint Applicants' constitutional rights. The district court and the Fourth Circuit have collectively rejected this argument on three prior occasions, and the Commission should follow suit because SCE&G's argument is without merit. Contrary to the Joint Applicants' assertions, the Act's definitional sections are constitutional and the Commission should apply them in deciding the matters pending in these Consolidated Dockets.

[3] Speaker Lucas maintained that these arguments belonged before the Commission all along. SCE&G, however, insisted on filing an action in federal court. SCE&G lost its challenge and now seeks to rehash the same arguments in these proceedings.

ARGUMENT

The Commission should reject the Joint Applicants' redundant arguments as well as their bold request for the Commission to ignore the proper prudency standards codified into law by the General Assembly in deciding the matters pending in these Consolidated Dockets.

I. The Joint Applicants' allegation that the Commission cannot review or revise any prior order is without merit and must be rejected under the plain terms of the BLRA.

In their petition for declaratory relief, the Joint Applicants allege that the Commission's initial prudency determination and subsequent revised rate orders cannot be set aside under a collateral estoppel theory. See Jt. Apps.' Mot. in Limine at 6–23, §§ I, II & III. The Commission should reject this argument because it contravenes the plain language of the BLRA.

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Here, the Joint Applicants espouse that the Commission cannot alter any prior orders issued under the BLRA—regardless of subsequent developments with the Project—and contend SCE&G was guaranteed a full recovery of all costs related to the failed Project. Id. The Joint Applicants attempt to use collateral estoppel to avoid the plain language of the BLRA that refutes SCE&G's position in full. This argument is a mere variance of SCE&G's argument in federal court that the BLRA created a property right and guaranteed SCE&G full recovery of all rate orders regardless of subsequent developments with the Project.

Under either this meritless collateral estoppel theory or the version advanced to the federal court, SCE&G's argument fails. The plain language of the BLRA did not guarantee SCE&G a right to full recovery through non-reviewability of prior prudency or rate orders. Rather, the BLRA only insulated prior Commission orders from being reopened if the Project met certain

requirements set forth in the BLRA. As the district court found, SCE&G failed to adhere to those requirements and, therefore, lost any protections as to prior orders issued by the Commission. The Commission should find likewise and reject SCE&G's meritless argument.

A. The BLRA does not insulate prior Commission rate orders from review after abandonment of the Project.

The BLRA only protects prior rate orders from reviewability "so long as the plant is constructed or being constructed." S.C. Code Ann. § 58-33-275(A) & (C). This is evident from the plain and unambiguous language of the BLRA that SCE&G continues to ignore in its filings with the Commission. As the Joint Applicants well know, prior Commission orders become fully reviewable post-abandonment, and collateral estoppel cannot and does not change that analysis.

Section 58-33-275 of the South Carolina Code, which addresses base load review orders and recovery of capital costs by a utility, provides the following:

> (A) A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as the plant is constructed or is being constructed within the parameters of:
>
> (1) the approved construction schedule including contingencies; and
>
> (2) the approved capital costs estimates including specified contingencies.
>
> (B) Determinations under Section 58-33-275(A) may not be challenged or reopened in any subsequent proceeding, including proceedings under Section 58-27-810 and other applicable provisions and Section 58-33-280 and other applicable provisions of this article.
>
> (C) So long as the plant is constructed or being constructed in accordance with the approved schedules, estimates, and projections set forth in Section 58-33-270(B)(1) and 58-33-270(B)(2), as adjusted by the inflation indices set forth in Section 58-33-270(B)(5), the utility must be allowed to recover its capital costs related to the plant through revised rate filings or general rate proceedings.

S.C. Code Ann. § 58-33-275(A)–(C) (emphasis added). Those subsections plainly and unequivocally state that prior rate orders are final and binding only "so long as the plant is constructed or is being constructed." Id. (emphasis added).

During construction or after successful completion of the Project within the schedule and on budget, see S.C. Code Ann. § 58-33-275(A)(1)–(2), the BLRA did allow rate recovery "so long as" construction continued or upon SCE&G's timely and on-budget completion of the project. This incentive was necessary because it gave utilities the ability to recover prudently incurred costs and expenses during construction, which was a deviation from prior South Carolina law, through rates approved by the Commission. See S.C. Energy Users Comm. v. S.C. Elec. & Gas, 410 S.C. 348, 354, 764 S.E.2d 913, 916 (2014).

Section 58-33-275(B) precluded second guessing or alteration of the approved rates but only during a limited time and not in perpetuity as alleged by the Joint Applicants. That subsection provided non-reviewability during the construction process or after a properly completed project. This subsection incentivized the investment of SCE&G and offered the necessary support to begin construction by providing rate certainty during the construction and to eliminate challenges that could stall a work-in-progress construction project.

Critically here, the non-reviewability offered by subsection (B) only existed if the utility met the parameters that govern the application of subsection (A). See S.C. Code Ann. § 58-33-275(B) (qualifying subsection (B) with the introductory clause of "Determinations under Section 58-33-275(A)"). Subsection (A) mandates that a project must be under construction while remaining on schedule and within budget for the utility to receive the protections of that subsection. See S.C. Code Ann. §§ 58-33-275(A), (A)(1) & (A)(2). If construction progress did not meet those criteria, then the utility lost the protections of non-reviewability and finality offered by subsection (B). That is precisely what occurred here. SCE&G stopped construction and abandoned the

Project. Thus, SCE&G cannot meet the requirements of subsection (A). The failure to meet the subsection (A) requirements because of abandonment renders subsection (B) inapplicable. In other words, SCE&G loses its claim to non-reviewability of all prior rate orders issued by the Commission.

In sum, a plain reading of section 58-33-275 refutes the Joint Applicants' claim of non-reviewability of the prior rate orders. The Commission is, therefore, free to alter any prior rate order at this time.

B. The BLRA does not convert the initial prudency determination to start construction into a mandate for full recovery by SCE&G after abandonment of the Project.

SCE&G likewise misconstrues the effect of the Commission's initial prudency determination. SCE&G claims the initial prudency determination—to start construction—made under subsection 58-33-275(A) carries over to the abandonment provision, is non-reviewable, and mandates full recovery to SCE&G. See Jt. Apps.' Mot. in Limine at 19–20, § I(F). This argument again ignores the clear language of the BLRA to the contrary. The abandonment provision contains no such mandatory requirement, nor does it alter the impact of section 58-33-275.

The abandonment provision provides the following:

> Where a plant is abandoned after a base load review order approving rate recovery has been issued, the capital costs and AFUDC related to the plant shall nonetheless be recoverable under this article provided that the utility shall bear the burden of proving by a preponderance of the evidence that the decision to abandon construction of the plant was prudent. Without limiting the effect of Section 58-33-275(A), recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs.

S.C. Code Ann. § 58-33-280(K). This plain language establishes that the Joint Applicants' claims are unavailing for several reasons.

First, as noted above, subsection 58-33-275(A) determinations only apply when a project remains under construction while on schedule and within budget. See S.C. Code Ann. § 58-33-275(A), (A)(1) & (A)(2). That is no longer the case in this matter after abandonment. The claim that subsection 58-33-275(B) would preclude review in an abandonment proceeding of the nine rate orders entered by the Commission has no merit. As noted above, the protections of non-reviewability offered by subsection (B) terminate if the utility cannot meet the requirements of subsection (A). Again, SCE&G cannot do so here because construction has been abandoned.

Second, the "[w]ithout limiting the effect of Section 58-33-275(A)" phrase in subsection 58-332-280(K) does not establish that the initial prudency determination binds the abandonment analysis as the Joint Applicants contend. The Supreme Court of South Carolina has construed this language to have limited effect. The qualification simply stands for the proposition that a party cannot end-run the effect of subsection 58-33-275(A) while construction is ongoing to readdress or reopen prudency determinations or rate orders. See S.C. Energy Users Comm., 410 S.C. at 357–58, 764 S.E.2d at 918–19 (holding that an abandonment analysis would be improper while construction ongoing because the "possibility of prudency challenges while construction was underway increased the risks of these projects as well as the costs and difficulty of financing them" (emphasis added)).[4] Section 58-33-275, therefore, has no impact on the abandonment provision once construction has ceased.

Third, the Joint Applicants ignore the second sentence of the abandonment provision because the plain language allows for something that SCE&G does not want—namely, the removal

[4] It is ironic that the Joint Applicants heavily rely upon this case for their meritless proposition when, in fact, the opinion does not support their claims to the Commission.

of imprudent costs and expenses from the rate by the Commission regardless of the initial prudency determination. Importantly, the argument fails because it would render the second sentence of the abandonment superfluous. Such a finding would run afoul of settled South Carolina law. See, e.g., CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (asserting the court "must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous'" (quoting State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008))).

Even if proper, the Joint Applicants' claims of non-reviewability of prudency determinations post-abandonment do not comport with the language of the abandonment provision. The plain language in the statute merely establishes a two-part test to allow a utility to recover certain costs and expenses after construction is abandoned. The first sentence of subsection 58-33-280(K) creates the prerequisite of a finding that the utility prudently abandoned the project. If prudency exists, then the second sentence would allow possible recovery of certain costs and expenses related to the nuclear project.

Accordingly, the plain language of the abandonment provision refutes the Joint Applicants' claims of non-reviewability at this stage. The BLRA does not guarantee a full recovery of the nuclear rates simply because the Commission initially approved the Project or imposed rates under section 58-33-275. Rather, the plain language of the abandonment provision establishes a two-prong test independent from any prudency findings or rate orders made while the Project remained under construction. The Commission, therefore, should disallow all imprudent costs and expenses.

II. The Act's definitional sections are not retroactive, and the Joint Applicants' constitutional claims are without merit.

Finally, the Commission should join the federal courts in rejecting the Joint Applicants' claim that the Act's definitional sections are unconstitutionally retroactive. The prudency

definitions fall comfortably within the constitutional strike zone, and the Commission should apply them in deciding the matters pending in these Consolidated Dockets.

"All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). A legislative enactment fails to pass constitutional muster "only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." Id.

Both the U.S. Constitution and the South Carolina Constitution prohibit the government from taking property without just compensation. See U.S. CONST. amends. V & XIV; S.C. CONST. art. I, § 13. A party, however, must have an interest in the property taken for public use. It is axiomatic that "not all economic interests are 'property rights'" and such interests will only give rise to "rights" when they have a legal basis that is "so recognized" that a court may "compel others to forbear from interfering with them or to compensate for their invasion." United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

The Fifth Amendment "does not undertake . . . to socialize all losses, but only those which result from a taking of property." Id. The U.S. Supreme Court has repeatedly "dismissed 'taking' challenges on the ground that, while the government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978). Thus, as a predicate to establishing their takings claim, the Joint Applicants must first demonstrate they had an interest in the property purportedly taken without just compensation. See id.

Likewise, to prevail on a substantive due process claim, the Joint Applicants must demonstrate (1) they had a property interest, (2) the Act deprived them of this property interest,

and (3) "the state's action falls so far beyond the outer limits of governmental action that no process could cure the deficiency." Sylvia Dev. Corp. v. Calvert Cty., 48 F.3d 810, 827 (4th Cir. 1995). "The protection of substantive due process is indeed narrow and covers only state action which is 'so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." Id. (quoting Rucker v. Harford Cty., 946 F.2d 278, 281 (4th Cir. 1991)).

It is well established that laws "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the [General Assembly] has acted in an irrational and arbitrary way." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). As the U.S. Supreme Court has held, "[i]t is surely proper . . . to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons" the General Assembly "rationally believes should bear them." United States v. Sperry Corp., 493 U.S. 52, 65 (1989).

Indeed, the U.S. Supreme Court's jurisprudence makes "clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). "This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." Usery, 428 U.S. at 16.

> The mere fact that a statute has a retrospective application does not necessarily render it unconstitutional. For instance, a statute that merely clarifies rather than changes existing law does not operate retrospectively even if it is applied to transactions predating its enactment. The retroactive nature of clarifying legislation has limits and must not operate in a manner that would unjustly abrogate "vested rights."

16B AM. JUR. 2D Constitutional Law § 735 (2018) (footnotes omitted); see also Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 33, 736 S.E.2d 651, 660 (2012) (Beatty, J., concurring in part and dissenting in part).

With these principles in mind, the district court properly concluded SCE&G did not have a legitimate property interest in revised rates sufficient to give rise to a takings or due process claim. S.C. Elec. & Gas Co. v. Randall, No. 3:18-cv-01795-JMC, 2018 WL 3725742, at *10 (D.S.C. Aug. 6, 2018). Contrary to its assertions, SCE&G does not have a legal right to recover all revised rates from its customers. Nor is this purported right "so recognized" under South Carolina law to prevent the Commission from altering the amount of revised rates SCE&G can recover. As noted above, under the BLRA, revised rates are only recoverable (1) during construction and (2) while on budget and on schedule. See S.C. Code Ann. §§ 58-33-220 & -275. Neither requirement is met here because the Project was abandoned. Furthermore, SCE&G's presumptuous claim that it is legally entitled to recover all revised rates rests on the shaky assumption that such costs were prudently incurred in the first place. The prudency question has not yet been determined and is squarely before the Commission in these Consolidated Dockets.

Turning to the definitional sections, the Commission should apply the Act's definitions of prudency and imprudency to the present case because they are not unconstitutionally retroactive. The district court expressly rejected the Joint Applicants' claims of constitutional infirmity:

> In its preliminary injunction motion, SCE&G argued, "The Act attaches new legal rights and consequences to events and actions that have already happened, including by redefining 'prudency,' a critical term under the BLRA establishing what is, and is not, subject to capital cost recovery." However, the BLRA did not define "prudency," so the Act cannot "redefin[e]" "prudency." Instead, the Act provides the first definition of the term "prudency" and "imprudency" as related to the BLRA. "Altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes, and simply does not answer the retroactivity question." Neither does the Act's

> definition of "prudency" in this case answer the retroactivity question. SCE&G argues, "The definition of 'prudent'. . . is explicitly not related to concepts of 'negligence, carelessness, or recklessness,' which leaves entirely unclear the standard that the PSC should impose under this new definition." However, the same was true before passage of the Act because the BLRA did not define "prudency," also leaving unclear the standard that the PSC should impose when making prudency determinations. Therefore the Act does not "attach[] new legal consequences to events completed before its enactment."

S.C. Elec. & Gas Co. v. Randall, No. 3:18-cv-01795-JMC, 2018 WL 3751470, at *2 n.5 (D.S.C. Aug. 7, 2018) (quoting Rivers v. Roadway Exp., Inc., 511 U.S. 298, 308 (1994); Langraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).

The district court got it right. The Act merely "clarified existing law" by engrafting, for the first time, definitions of the terms "prudency" and "imprudency." 16B AM. JUR. 2D Constitutional Law § 735. The Act, therefore, "does not operate retrospectively even if it is applied to transactions predating its enactment." Id. Curiously, the Joint Applicants appear to concede they cannot meet the test for prudency under the definitions codified into law. But that is of no consequence here. "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," Pension Ben. Guar. Corp., 467 U.S. at 729, and "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." Usery, 428 U.S. at 16. Although the Joint Applicants would prefer that the Commission employ a definition of prudency that they unilaterally determined was correct during the course of the Project, that is not allowed under the law. The General Assembly passed a bill that became law, the law survived a constitutional challenge in federal court, and the Commission is required to follow it. The Joint Applicants' arguments to the contrary are without merit.

Therefore, the Commission should deny the Joint Applicants' motion in limine to exclude any evidence, testimony, or argument of counsel relating to the definitions of prudency. The Joint

Applicants have no "vested right" to recover all revised rates under the BLRA, and the Act's definitional sections are not unconstitutionally retroactive.

CONCLUSION

Based upon the foregoing, the Commission should deny the Joint Applicants' motion for declaratory rulings and motion in limine because their redundant arguments are without merit. The prudency standards set forth by the General Assembly are not retroactive, have already passed constitutional muster, and apply to these proceedings.

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